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# State v. Ferguson Respondent's Brief Dckt. 43826

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	Nos. 43826 & 43827
Plaintiff-Respondent,	)	
	)	Kootenai County Case Nos.
v.	)	CR-2015-6545 &
	)	CR-2015-8098
CHAD THOMAS FERGUSON,	)	
	)	
Defendant-Appellant.	)	RESPONDENT'S BRIEF
	)	

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Issue

Has Ferguson failed to establish that the district court abused its discretion by imposing concurrent unified sentences of 10 years, with three years fixed, upon his guilty pleas to two counts of felony injury to children?

Ferguson Has Failed To Establish That The District Court Abused Its Sentencing Discretion

In case number 43826, the state charged Ferguson with sexual abuse of a child under 16 years of age for sexually abusing a 12-year-old victim. (R., pp.33-34.) In case number 43827, the state charged Ferguson with two counts of lewd conduct with a

minor under 16 for sexually abusing a 14-year-old victim and a 10-year-old victim. (R., pp.78-79.) Pursuant to a plea agreement, the state amended the charges to one count of felony injury to children in each case, and Ferguson pled guilty to the two counts. (R., pp.142-43.) The district court imposed concurrent unified sentences of 10 years, with three years fixed. (R., pp.177-79; Judgment (Augmentation).) Ferguson filed a notice of appeal timely from the judgments of conviction. (R., pp.180-83.)

Ferguson asserts his sentences are excessive in light of the nature of the offenses, Ferguson's claims that he "did not willfully" sexually abuse the victims, his mental health issues and their impact on his behavior, his "low to moderate" risk to sexually reoffend, and his purported remorse. (Appellant's brief, pp.3-6.) The record supports the sentences imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it

appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The penalty for felony injury to children is not less than one year, up to 10 years in prison. I.C. § 18-1501(1). The district court imposed concurrent unified sentences of 10 years, with three years fixed, for the two counts of felony injury to children, which fall well within the statutory guidelines. (R., pp.177-79; Judgment (Augmentation).)

On appeal, Ferguson claims that the district court did not adequately consider how his Asperger's syndrome "may have contributed to his memory failure." (Appellant's brief, p.5.) While it is true that the psychological evaluator stated that Ferguson's "failure to accurately recognize, and therefore cognitively label his experiences, may be considered contributory to *his reference of* having memory failure related to this actions pertaining to the instant offense" (PSI, p.13<sup>1</sup> (emphasis added)), the evaluator also indicated that Ferguson's claim of memory failure was more likely Ferguson "erroneously label[ing] [his] lack of awareness as a lack of recall" (PSI, p.15). The evaluator concluded:

Mr. Ferguson's reports of alleged memory failure specifically related to his actions associated with the instant offense are not considered consistent with any known pattern of neuropsychological/cognitive-based memory functioning.

... [Ferguson's] observed selective memory failures, surrounding an otherwise intact recall of events immediately preceding and following the instant offense, is not consistent with an expected pattern of neurogenic memory failure.

...

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file "CR15-6545 & CR15-8098 FERGUSON PSI 43826 43827.pdf."

There is no indication that Mr. Ferguson was suffering from a reactive state, such as would be expected to accompany a psychologically-based dissociative state, resulting in his memory impairment. In addition, such a dissociative state is not expected to result in such sporadic or selective impairment in memory.

(PSI, pp.15-16.)

The district court articulated its consideration of the psychological evaluation and stated, “I do hear clearly the psychological evaluation saying that you may not understand social boundaries or you may not understand the impact of certain actions that you have, but what I read in this evaluation is that you understand actions and you understand instances.” (12/8/15 Tr., p.32, Ls.19-24.) The court concluded that, regardless of whether or not Ferguson clearly remembered the details of his offenses at a later time:

... [A]t the time that you were committing these acts of sexual abuse, you knew they were wrong and you knew they were sexual abuse at that time. There was no confusion about that because you did them in secret. You did them in a manner in which you lowered the resistance of these victims under the guise of a hug ....

(12/8/15 Tr., p.32, L.25 – p.33, L.9.) As such, it is clear that the district court did, in fact, consider how Ferguson’s mental issues may have impacted his capacity to appreciate the wrongfulness of his conduct. Ferguson has not established that the district court abused its discretion by failing to adequately consider his mental issues.

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth in detail its reasons for imposing Ferguson’s sentences. (12/8/15 Tr., p.29, L.12 – p.36, L.14.) The state submits that Ferguson has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt

of the sentencing hearing transcript, which the state adopts as its argument on appeal.  
(Appendix A.)

Conclusion

The state respectfully requests this Court to affirm Ferguson's convictions and sentences.

DATED this 15th day of July, 2016.

\_\_\_\_\_  
/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of July, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ANDREA W. REYNOLDS  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

\_\_\_\_\_  
/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

## APPENDIX A

<p>1 With all of that said, Judge, I think it's  2 important to read this same evaluation -- the same  3 psychological evaluation together with the psychosexual  4 evaluation. If you read that, you can see it running  5 parallel. When the psychosexual evaluation talks about  6 the social isolation, the social difficulties that Chad  7 has; that's parallel with what he's been diagnosed with.  8 When it talks about the risk factors -- I'm  9 looking at page 11 of 13. When it talks about the lack  10 of significant social influences, the lack of capacity  11 for relationship, stability. I think that's really  12 important to read that in light of the diagnosis that he  13 has. He's not choosing to be isolated. This is  14 something that's happened as a culmination of his life  15 experience, a culmination of things he was born with.  16 But all hope is not lost. There's hope.  17 There's a plan for him. There's steps he can take.  18 There's a structure that he can engage in to live a good  19 life. To live a law-abiding life and learn to pick up  20 on the social cues and the social norms.  21 The last thing I want to say, Judge, is that  22 Chad absolutely knows that what he did was wrong. He  23 absolutely has come all the way around to look at it, at  24 the impact it has on the young ladies and their  25 families. And he knows that he's caused mistrust. He</p> <p style="text-align: center;">28</p>	<p>1 knows that he's caused hurt. He knows that he's caused  2 confusion. And he knows that he's caused anger and any  3 other number of emotions. And he is sorry for causing  4 that. He knows that that's what his actions caused.  5 Your Honor, I think it's appropriate to impose  6 a period of probation in this particular case.  7 THE COURT: Thank you. All right. We're  8 going to be off the record for just a moment.  9 (Off the record.)  10 THE COURT: All right. We're back on the  11 record.  12 Mr. Ferguson, having accepted your guilty  13 pleas to the two offenses of injury to child in 15-6545,  14 one count and 15-8098, one count, it is the judgment of  15 the Court that you are guilty of those offenses.  16 I want to move around here so the young woman  17 named J.L. can -- she read well for the Court, I want  18 her to be able to clearly hear the Court here. We don't  19 call you J.L. -- it's just we just don't use the names  20 of children at court.  21 Whenever the Court sentences an individual,  22 Mr. Ferguson, I have four factors of sentencing that I  23 have to think about. And I think about them in your  24 case. Those factors include, first of all, how to best  25 protect society with a sentence that's given.</p> <p style="text-align: center;">29</p>
<p>1 A second factor is how to deter you from this  2 kind of conduct, but also how to deter other people in  3 similar situations from committing such offenses.  4 A third factor is how to address the  5 punishment that society expects under all these  6 circumstances.  7 And then a fourth and important factor is how  8 to help any rehabilitation that can be aided by the  9 sentence. Again, I have those sentence factors in mind.  10 In case 6545 I give you credit for 219 days  11 served leading up to today's sentencing. You were  12 arrested somewhat later in the other case. In 8098, I  13 give you credit for 191 days served in that case.  14 I'm ordering that you submit a DNA sample to  15 the Department of Probation and Parole. That's a cheek  16 swab and a thumbprint so that your DNA is on record with  17 the Idaho Bureau of Criminal Identification.  18 I am taking into account today the fact that  19 you do have a prior criminal history of a felony theft  20 in the state of Washington; although, you were only 19  21 years old at the time, but it is a prior felony in your  22 his history.  23 I'm also taking into account the fact that  24 there has been a crime committed by you in 2014  25 involving a juvenile. The child that was living in the</p> <p style="text-align: center;">30</p>	<p>1 household, a young man, that you were living in and that  2 was a misdemeanor battery offense.  3 I'm taking into account the fact that in the  4 polygraph examination you did speak of another underaged  5 victim, but you were also a juvenile at the time as  6 well.  7 But I'm also taking into account here that  8 there are three separate victims in this case. All of  9 which are juveniles. They're -- especially J.L.'s  10 statement to the police and to the Court today are  11 crystal clear about what happened. The other two young  12 ladies have less clear statements, but I think there's  13 something to that in as much as you were not so  14 emotionally related to J.L. as you were to the other  15 children. You were a male figure living in that  16 household and they had, I think, some ambiguous feelings  17 about really telling what you did.  18 But it is clear to the Court that what you did  19 is sexual abuse of children. Whether you are convicted  20 of injury to child or not, it's clearly before the Court  21 that this is sexual abuse of children. I am taking into  22 account the fact that the psychosexual evaluation --  23 excuse me, the psychological evaluation does -- the  24 following factors that I made note of. There was some  25 indication in the testing that you were maybe -- and I</p> <p style="text-align: center;">31</p>



<p>1 use this for lack of the proper psychological word --  2 that you were faking bad to a small degree in the  3 psychological evaluation. That there was some  4 exaggeration to make your psychological symptoms look a  5 little worst; however, not so much that it became an  6 invalid examination, but it's a small thing that I  7 noted.</p> <p>8 I did take note of the fact that this may be  9 termed as the Asperger's Syndrome and that is some  10 degree of, I think, explanation to the Court about the  11 nature of your social interactions and the nature as  12 well with the interaction with the Court. It's always  13 been somewhat subdued and withdrawn and that's certainly  14 an explanation of that.</p> <p>15 What I do not take note -- or what I do not  16 hear in this psychological evaluation is any support for  17 this lack of memory that you say happened. I just --  18 when the police contacted you, you say I might have done  19 it, I just don't remember it. I do hear clearly the  20 psychological evaluation saying that you may not  21 understand social boundaries or you may not understand  22 the impact of certain actions that you have, but what I  23 read in this evaluation is that you understand actions  24 and you understand instances.</p> <p>25 The other thing that I see in this particular</p> <p style="text-align: center;">32</p>	<p>1 case is that you at the time that you were committing  2 these acts of sexual abuse, you knew they were wrong and  3 you knew they were sexual abuse at that time. There was  4 no confusion about that because you did them in secret.  5 You did them in a manner in which you lowered the  6 resistance of these victims under the guise of a hug,  7 you were touching the breast area of the two young  8 ladies that you -- in the same house that you lived  9 with.</p> <p>10 In some degree that was -- you talk about "I  11 had some kind of a flashback, I thought it was my  12 girlfriend or something like that," is simply not very  13 believable. You would not do these actions in front of  14 people. And in any way -- I mean, that might be an  15 instance where I would believe you don't really know you  16 were doing then, if you performed an inappropriate act  17 and people said "What are you doing?" And you indicate  18 I didn't know that was wrong or I didn't know people  19 that that was bad or something like that.</p> <p>20 And I am simplifying something terrible here.  21 But that would surely be to me a complete lack of  22 awareness of the right and wrong of what you did. But  23 particularly with J.L., this was an incident that  24 occurred over some time on this one particular evening.  25 It began with touching that didn't seem necessarily</p> <p style="text-align: center;">33</p>
<p>1 alarming. But the touching progressed into areas that  2 made her feel a little more uncomfortable and then a  3 little more uncomfortable and then you left and you came  4 back and continued what appeared to be just an arm  5 around a person while playing a video game or watching  6 something on a screen and the touching became a little  7 more intimate and a little more intimate to the point  8 where she had to report it.</p> <p>9 That type of surreptitious and progressive  10 touching indicates to the Court that you absolutely knew  11 what you were doing in that instance and you knew it was  12 wrong and that child was sexually victimized by you.</p> <p>13 The psychosexual evaluation, I make note of  14 the fact that that evaluator indicates at one stage that  15 you have attributes, behaviors and sexual attitudes  16 highly similar to those of known sex offenders. That's  17 an issue of public risk there.</p> <p>18 I also note that you are, overall, maybe not  19 in each individual testing, but overall you were defined  20 as a moderate risk of sexual recidivism limited because  21 you had limited insight into the potential victim harm  22 that your conduct can cause and that the -- if you were  23 to recidivate, your victims would likely be late  24 childhood or early teen victims. And that's only if you  25 did recidivate and you were in a class of persons who</p> <p style="text-align: center;">34</p>	<p>1 were a moderate risk to reoffend sexually. Now, on the  2 other hand, the psychosexual evaluation did indicate you  3 were amenable to treatment under certain, I think,  4 structured sentence.</p> <p>5 For all of those reasons, I have to consider  6 those four factors of sentencing very important for me  7 to consider the protection of society, the protection of  8 other young people that you come in contact with. I  9 also have to make known in this community that if  10 person's know what they're doing, even if they don't  11 have complete awareness or complete clarity of insight  12 into what's happening, but they know what they're doing  13 is wrong and it involves children and it involves sexual  14 touching, they have to know that that will not in any  15 way be tolerated. And the way we deal with that is with  16 punishment in this community. Setting you away from  17 people for some time until other authorities believe  18 that you're such that your risk to be in the community  19 is acceptable.</p> <p>20 For those reasons, your unified sentences in  21 both of these counts is the ten-year sentence; three  22 years fixed followed by seven years indeterminate. I'm  23 running those sentences concurrently. I am not  24 retaining jurisdiction. I am not suspending the  25 sentences. Those will be term imposition sentences.</p> <p style="text-align: center;">35</p>

<p>1 After the fixed term, you will be able to present to the  2 parole board for the possible parole at some point.  3 I'm saying this to all the family out there,  4 the victim family, that's listening is we are addressing  5 protection of society, we're addressing punishment, but  6 Mr. Ferguson is going to have the ability to be out in  7 the community at some time probably within a handful of  8 years, I don't know. It won't be any more than ten  9 years; it won't be any less than about two and a half  10 years. Somewhere in that time frame he has the chance  11 to be out in the community on parole and then go through  12 the rehabilitation that the parole board will impose for  13 him. So we're addressing those things that the parties  14 had talked about.  15 Because this matter is now a final judgment, I  16 cannot impose a no-contact order; however, the  17 Department of Corrections will now have custody over  18 Mr. Ferguson. The prosecution can tell both of the  19 mothers there how they can make their wishes known to  20 the Department of Corrections, so that no contact can be  21 had with your families if that's what you choose and the  22 Department of Corrections will monitor that.  23 So this particular no contact order is now  24 terminated because it's a final judgment but the  25 Department of Corrections can put restrictions on</p>	<p>1 Mr. Ferguson's contact.  2 Are there any questions from the state?  3 MS. SIMMONS: No thank you, Judge.  4 THE COURT: Are there any questions from the  5 defense?  6 MS. TAYLOR: No questions, Judge, but a  7 request to make the psychological evaluation part of the  8 PSI packet that goes with Mr. Ferguson so the Department  9 has that when placing him.  10 THE COURT: It is made part of the PSI packet  11 as are the polygraph results and as are the psychosexual  12 evaluation.  13 Any other questions?  14 MS. TAYLOR: No. Thank you, Judge.  15 THE COURT: With that, you're remanded to the  16 bailiff to begin the service of this sentence. I wish  17 you good luck on this sentence and a parole at some  18 date.  19 With that, you are excused and we are  20 adjourned.  21 (Court adjourned.)  22  23  24  25</p>
36	37